Wiley Rein & Fielding LLP

MEMORANDUM

ATTORNEY CLIENT PRIVILEGED - CONFIDENTIAL

TO: The Honorable Anthony J. Principi
Chairman, Defense Base Closure and Realignment Commission

FROM: Fred F. Fielding

DATE: August 3, 2005

RE: Apparent Legal Authority of the Secretary of Defense to Recommend Changes to Air National Guard and National Guard Units and Installations Pursuant to the Defense Base Closure and Realignment Act of 1990, as Amended

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I. Introduction.

The Defense Base Closure and Realignment Act ("BRAC statute") of 1990, as amended, governs the 2005 round of base realignment and closure decisions.[1] Pursuant to the BRAC statute, the Secretary of Defense ("Secretary") presented a force-structure plan and infrastructure inventory to Congress and the Defense Base Closure and Realignment Commission ("BRAC Commission") and published final selection criteria for use in making base closure and realignment recommendations.[2] Subsequently, the Secretary transmitted to Congress and the BRAC Commission a list of military installations that the Secretary recommends for closure or realignment based on the force-structure plan and the final selection criteria.[3] The final selection criteria are "the only criteria to be used, along with the force-structure plan and infrastructure inventory" in making base closure and realignment recommendations in 2005.[4]

Among the actions recommended by the Secretary are: (1) the closure of certain installations on which Army National Guard or Air National Guard ("National Guard") units are

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[1] Defense Base Closure & Realignment Act of 1990, as amended, Pub. L. No. 101-510, §§ 2901-11, 104 Stat. 1808 (codified at 10 U.S.C. § 2687 note (§§ 2901-14)).

[2] 10 U.S.C. § 2687 note (§§ 2912(a), 2913).

[3] *Id.* § 2687 note (§ 2914(a)).

[4] *Id.* § 2687 note (§ 2913(f)).

located and the associated relocation or change to equipment, headquarters, units, and/or missions; and (2) the realignment of certain installations on which National Guard units are located and the associated relocation or change to equipment, headquarters, units, and/or missions.[5] Pursuant to your instruction, we enclose herewith our analysis of issues related to these recommendations.

II. Presentation of Issues.

The question is whether the Secretary may recommend the above actions involving military installations on which National Guard units exist without obtaining gubernatorial consent in each state in which such units are located. This question presents at least three subsidiary questions. First, do the proposed actions impacting National Guard equipment, headquarters, units, and/or missions fall within the parameters of the BRAC statute? Second, do the proposed actions impacting National Guard equipment, headquarters, units, and/or missions implicate other statutory schemes and, if so, does the BRAC statute override these schemes? Third, even if the proposed actions implicate other statutory schemes, may the BRAC Commission change recommendations based on this legal presumption and, relatedly, could a cause of action lie against the Secretary or the BRAC Commission for making or failing to reject such recommended actions?

III. The Secretary's Proposed Actions Fall Within the Parameters of the BRAC Statute.

A. The Purpose of the BRAC Statute Is to Provide an Expedited and Politically Neutral Base Closure Process.

A review of the evolution of the current BRAC process from prior statutory mechanisms for closing or realigning military installations is instructive for two reasons. First, it illustrates that the codified BRAC process was intended to be a comprehensive review of the United States military base structure without regard to partisan interests or local intervention. Second, and relatedly, it supports the plain language of the BRAC statute, which currently provides that BRAC is the "exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States."[6]

1. The Pre-BRAC Statute Base Closure and Realignment Process.

In the early 1960s, President Kennedy directed Secretary McNamara to implement an extensive base closure and realignment program aimed at reducing the sizeable base structure developed during World War II and the Korean conflict.[7] With minimal consultation with

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[5] It is not our opinion, based on the limited information we have to date, that the members of a State's Guard, outside of their federal reserve capacity, assigned to a headquarters or unit, may themselves be relocated or moved outside the State pursuant to a BRAC recommendation.

[6] 10 U.S.C. § 2687 note (§ 2909(a)).

[7] Defense Base Closure and Realignment Commission: Report to the President, 1995 ("1995 BRAC Commission Report"), ch. 4, at 4-1; Report of the Defense Secretary's Commission, 1988 ("1988 Secretary's Commission Report"), ch. 1, at 8.

Congress or the military services, Secretary McNamara closed or realigned hundreds of bases.[8] In 1965, suspicious that politics had played a role in the selection of bases for closure or realignment, members of Congress responded by enacting legislation that established reporting requirements for base closures.[9] President Johnson promptly vetoed the legislation, setting off a decade-long struggle between the branches over base closures.[10]

In 1977, Congress succeeded in curtailing the Secretary's ability to close or realign military bases.[11] Tucked into the fiscal year 1978 military construction bill signed by President Carter was a provision requiring the Secretary to undertake extensive notification, reporting, environmental, and layover requirements prior to closing or realigning a military installation.[12] The provision subsequently was codified at § 2687 of title 10, U.S. Code.[13]

As enacted, § 2687 barred the Secretary from closing or realigning an installation at which at least 500 civilian personnel were authorized to be employed, or realigning an installation if the realignment involved a reduction of more than 1,000 (or 50 percent of) personnel authorized to be employed, unless the Secretary took certain steps.[14] Specifically, the Secretary was to notify Congressional armed services committees of the proposed closure or realignment, comply with environmental law, submit his final decision to the committees accompanied by a detailed justification evaluating its possible consequences, and wait 60 days before implementing the decision.[15] However, the statute removed § 2687's procedural hurdles for closures or realignments above the numeric thresholds that the President certified as necessary for reasons of national security or a military emergency.[16] Section 2687 later was amended to lower the number of authorized civilian personnel from 500 to 300, require committee notification as part of the Secretary's annual authorization request, and extend the waiting period to the longer of 30 legislative days or 60 calendar days.[17]

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Military Construction Authorization Act ("MilCon Act"), Pub. L. No. 95-82, tit. VI, § 612, 91 Stat. 358 (1977); *see also* S. REP. NO. 95-125 (1977); H. REP. NO. 95-494 (1977) (Conf. Rep.).

[13] 10 U.S.C. § 2687.

[14] MilCon Act § 612(a), (b).

[15] *Id.*

[16] *Id.* § 612(c).

[17] 10 U.S.C. § 2687; Department of Defense Authorization Act, Pub. L. No. 99-145, tit. XII, § 1202(a), 99 Stat. 716 (1985).

Following the enactment of § 2687, virtually no closures took place over the next decade.[18] In 1988, faced with a declining Department of Defense ("DOD") budget, Secretary Carlucci worked with Congress to develop a two-part base closure approach, under which the Secretary would establish an executive-branch commission ("Secretary's Commission") to review the military base structure, and Congress would draft legislation to implement the Secretary's Commission's recommendations.[19] The objective of this approach was to streamline base closure and realignment procedures by removing existing bureaucratic and legislative roadblocks.[20]

Accordingly, the Secretary established a 12-member commission charged with determining the best process for identifying bases for closure or realignment, reviewing the military base structure, and reporting its recommendations to the Secretary by December 1988.[21] For its part, Congress enacted a BRAC statute ("1988 statute") that attempted to address the key impediments to DOD's ability to close or realign unneeded military installations.[22] At the outset, the 1988 statute was structured to address the "very political problem" of asking members of Congress to put aside parochial concerns and evaluate base closure recommendations objectively.[23] By codifying the Secretary's Commission and its mission, the 1988 statute

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[18] 1988 Secretary's Commission Report, ch. 1, at 9 (noting that "[s]ince passage of [§ 2687] over a decade ago, there has not been a single major base closure [as a]ll attempts at closing major installations have met with failure, and even proposed movements of small military units have been frustrated"); 134 CONG. REC. S15554-04 (daily ed. Oct. 12, 1988) (statement of Sen. Boschwitz) (asserting that "for more than a decade Congress has kept the military from closing any unneeded bases").

[19] 134 CONG. REC. S15554-04 (daily ed. Oct. 12, 1988) (statement of Armed Services Committee Ranking Member Warner) (describing how President Reagan and Secretary Carlucci "seized the initiative and approached the senior members of both the House and Senate Armed Services Committees [and together] devised this legislation").

[20] *Id.* (statement of Armed Services Committee Chairman Nunn) (explaining that "[t]he key to making the military installation structure more efficient and effective is to remove the current bureaucratic and legislative roadblocks to closing or realigning bases"); H. REP. NO. 100-735, pt. 1 (1988) (reporting that "[t]he purpose of [the bill] would be to streamline procedures on a one-time basis to expedite the realignment and closure of unneeded military installations").

[21] 1988 Charter: Defense Secretary's Commission on Base Realignment and Closure, The Pentagon (May 3, 1988).

[22] Defense Authorization Amendments & Base Closure & Realignment Act, Pub. L. No. 100-526, tit. II, §§ 201-09, 102 Stat. 2623 (1988) (codified at 10 U.S.C. § 2687 note (§§ 201-09)).

[23] 134 CONG. REC. S16882-01 (daily ed. Oct. 19, 1988) (statement of Ranking Member Warner) (also acknowledging that "[n]o Senators or Congressmen want to see jobs lost in their States or districts"); *see also id.* S15554-04 (daily ed. Oct. 12, 1988) (statement of Chairman Nunn) (noting that "[w]e also understand the reality and the sensitivity in the communities of America that are so dependent in some cases on these bases at least in the short run and we know that that reflects itself here in the Congress"); *id.* S15554-04 (statement of Ranking Member Warner) (recognizing "the apprehension of the Members of Congress [who may] say 'We are closing bases and we may close out my career in the Congress of the United States'"); *id.* S15554-04 (statement of Sen. Boschwitz) (indicating that although members "agree in principle that some military bases should be closed . . . this general consensus breaks down when it comes to specifics, when Members put up obstacles . . . to stop base closings in their home States"); *id.* H10033-01 (daily ed. Oct. 12, 1988) (statement of Rep. Dickinson) (emphasizing that "[h]istorically, we have been unable to [put in place a base-closing vehicle], at least for 12 years, because of political

"remove[d] Congress from micromanaging each and every proposal to close a military base."[24] At the same time, the 1988 statute also waived certain key statutes – including § 2687 – that the Secretary had identified as impediments to base closures.[25]

The 1988 statute produced immediate effects. In December 1988, the Secretary's Commission recommended closing or realigning 145 bases, and in May 1989, after the Congressional review period expired without a resolution of disapproval, the recommendations went into effect.[26]

2. The Post-BRAC Statute Base Closure and Realignment Process.

Because the 1988 statute provided streamlined base closure and realignment authority on a "one-time basis," the legal and political impediments to base closure returned upon its expiration at the end of 1988.[27] In early 1990, Secretary Cheney nonetheless issued a list of recommended closures and realignments, but the list met with Congressional opposition.[28]

Congress recognized that further reductions in installations were necessary, however, and in late 1990 enacted the BRAC statute as "the right way to close bases."[29] The BRAC statute

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considerations or whatever"); *id.* H10033-01 (daily ed. Oct. 12, 1988) (statement of Rep. Armey) (indicating that "[t]his [legislation] has been a difficult fight [and i]n the beginning, few thought that Congress would accept a bill that strikes so directly at pork barrel spending").

[24] 134 CONG. REC. S15554-04 (daily ed. Oct. 12, 1988) (statement of Sen. Boschwitz).

[25] H. REP. NO. 100-735, pt. I (reporting that the Secretary "stated that [DOD] is unable to close or realign unneeded military installations because of impediments, restrictions, and delays imposed by provisions of current law"); H. REP. NO. 100-735, pt. II (1988) (indicating that "[t]he Department contends . . . that a 1977 law (codified at 10 U.S.C. section 2687) created impediments to closure of unneeded facilities"); 134 CONG. REC. S16882 (daily ed. Oct. 19, 1988) (statement of Ranking Member Warner) (noting that the Secretary "requested that Congress enact legislation to remove the various impediments in law that prevent timely closure of military bases").

[26] 1995 BRAC Commission Report, ch. 4, at 4-2.

[27] H. REP. NO. 100-735, pt. I.

[28] 1995 BRAC Commission Report, ch. 4, at 4-3; *see, e.g.*, 136 CONG. REC. H7429-03 (daily ed. Sept. 12, 1990) (statement of Rep. Fazio) (arguing that "[t]here is very strong evidence to indicate that Secretary Cheney's base closing announcements are politically motivated"); *id.* H7429-03 (statement of Rep. Brown) (explaining that "the long list of base closures and realignments proposed by Secretary of Defense Cheney in January 1990 is not, in my opinion, either fair or forward-looking"); *id.* H7429-03 (statement of Rep. Schroeder) (urging Congress to "reject[] the back of the envelope, partisan base closure efforts used by Secretary Cheney so far").

[29] H. REP. NO. 101-665 (1990) (stating that "[t]he last two years have provided examples of both the right way and the wrong way to close bases[: t]he establishment of the Defense Secretary's Commission on Base Realignment and Closure in 1988 is an example of the right way to close bases . . . [while] Secretary Cheney's announcement of candidates for base closure on January 29, 1990, was an example of the wrong way to close bases").

built upon and made various improvements to the 1988 statute.[30] First, the BRAC statute authorized a bipartisan commission, with members to be appointed by the President and confirmed by the Senate.[31] Second, the BRAC statute established a multi-step process, subject to strict time limits, for making closure and realignment recommendations in 1991, 1993, and 1995, respectively.[32] It directed the Secretary to submit a force-structure plan to Congress, develop and publish criteria for selecting installations for closure or realignment, and formulate a list of recommendations based upon the force-structure plan and final selection criteria.[33] Upon receipt of DOD's recommendations, and with the assistance of the Government Accountability Office ("GAO"), the BRAC Commission was to conduct public hearings and review the recommendations to determine whether the Secretary had "deviated substantially" from the force-structure plan and final selection criteria.[34] The BRAC Commission then was to report to the President with its own recommendations, accompanied by explanations and justifications.[35] If the President approved the BRAC Commission's recommendations, he was to transmit them to Congress; if not, he was to return them to the BRAC Commission for revision and resubmittal.[36] Barring a joint resolution of disapproval by Congress, the recommended closures and realignments were to be carried out by the Secretary within a six-year period.[37]

The BRAC statute provided the Secretary with special authorities to implement closure and realignment recommendations.[38] Under the law, the Secretary could "take such actions as may be necessary" to close or realign an installation, manage and dispose of property, carry out environmental restoration and mitigation, and provide assistance to affected communities and employees.[39] In addition, the BRAC statute specified that it was to serve as "the exclusive authority" for base closures and realignments, with the exception of closures and realignments (1) that were implemented under the 1988 statute, or (2) to which § 2687 is not applicable,

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[30] S. REP. NO. 101-384 (1990) (describing the BRAC statute's adoption of the 1988 procedures with certain improvements).

[31] Pub. L. No. 101-510, § 2902.

[32] *Id.* § 2903.

[33] *Id.* § 2903(a)-(c).

[34] *Id.* § 2903(d).

[35] *Id.*

[36] *Id.* § 2903(e). If the President did not transmit an approved list of recommendations, the process was to be terminated. *Id.*

[37] *Id.* §§ 2904, 2908.

[38] *Id.* §§ 2905, 2909.

[39] *Id.* § 2905(a)-(b).

including those carried out for reasons of national security or military emergency.[40] To expedite the process even further, the BRAC statute also waived § 2687, along with certain property, environmental, and appropriations statutes, so that § 2687 could not impede the Secretary's ability to close or realign installations.[41]

Pursuant to the BRAC statute, three rounds of closures and realignments took place in 1991, 1993, and 1995, resulting in the closure or realignment of hundreds of installations.[42]

It was not until 2001 that Congress again turned its attention to the need to reduce excess military infrastructure.[43] After extensive debate, Congress approved legislation ("2001 amendments") amending the BRAC statute to authorize a 2005 round.[44] The 2001 amendments modified the BRAC statute to require the Secretary to submit, in addition to the force-structure plan, a comprehensive infrastructure inventory of every type of military installation for active

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[40] *Id.* §§ 2905, 2909.

[41] *Id.* § 2905(c)-(d). The 1990 waiver thus constituted a more comprehensive repeal of § 2687 than the 1988 version, which had merely authorized closures and realignments without regard to the "procedures set forth in" § 2687. Pub. L. No. 100-526, § 205(2); *see also* S. REP. NO. 101-384 (explaining that DOD should "reap the benefit of certain waivers [applied in 1988 to] permit a more rapid closure of installations[and] realization of the attendant savings[, and] expedite the disposal of the property and the development of local economic revitalization plans").

[42] DEP'T OF DEFENSE, REPORT REQUIRED BY SECTION 2912 OF THE DEFENSE BASE CLOSURE AND REALIGNMENT ACT OF 1990 ("Section 2912 Report"), app. C (2004). The process established by the BRAC statute withstood constitutional challenges under the non-delegation or separation of powers doctrines. *See Nat'l Fed'n of Fed. Employees v. United States*, 905 F.2d 400, 404-05 (D.C. Cir. 1990).

[43] The House of Representatives was more resistant than the Senate to authorizing an additional round. *E.g.*, 147 CONG. REC. H10069-01 (daily ed. Dec. 13, 2001) (statement of Rep. Baldacci) (noting that "this House has continually stood up and voted against any additional base closure commissions"). In 2001, the Senate approved defense authorization legislation providing comprehensive authority for a new BRAC round after narrowly defeating an amendment to strike that authority. 147 CONG. REC. S9763-07 (daily ed. Sept. 25, 2001); *see also* S. REP. NO. 107-62 (2001) (minority views of Sen. Bunning). By contrast, the House legislation provided only for limited authority relating to lease-back of base closure property. *Compare, e.g.*, S. 1416 *and* S. 1238 (providing comprehensive authority for a new BRAC round) *with* H.R. 2586 (providing only for limited authority for lease back of base closure property). Ultimately, the House acquiesced to the Senate proposal, modified to delay the next round from 2003 to 2005. H. REP. NO. 107-333 (2001) (Conf. Rep.); 147 CONG. REC. H10069-01 (statement of Armed Services Committee Chairman Stump) (explaining that "[o]ver the strong reservation of many House Members, including myself, we have agreed to authorize a round of base closures, but not until 2005"); *id.* H10069-01 (statement of Rep. Pomeroy) (stating that "I believe that . . . the Armed Services Committee correctly decided not to authorize additional base closures in the House bill [and] am disappointed that they were forced under the threat of a presidential veto to accept a provision authorizing a new round in 2005").

[44] National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, div. B, tit. XXX, §§ 3001-08, 115 Stat. 112 (codified at 10 U.S.C. § 2687 note (§§ 2904(a), 2905(b), 2906A, 2912-14)); H. REP. NO. 107-333 (Conf. Rep.); *e.g.*, 147 CONG. REC. S9763-07 (daily ed. Sept. 25, 2001) (statement of Armed Services Committee Chairman Levin) (stating that "[i]t seems to me, at a minimum, we ought to be willing now to set aside our own back-home concerns and do what is essential in order to have the efficient use of resources [especially] when we are asking our troops to go into combat")' *id.* S10027-07 (daily ed. Oct. 2, 2001) (statement of Sen. McCain) (arguing that "[w]e cannot, in this national emergency, let our parochial concerns override the needs of the military").

and reserve forces, and, based on these documents, certify whether a need existed for further closures and realignments.[45] The 2001 amendments also set forth specific selection criteria for the Secretary to use in making recommendations.[46] Moreover, while the 2001 amendments directed the Secretary to *consider* "any notice received from a local government in the vicinity of a military installation that the government would approve of the closure or realignment of the installation," they instructed him to make recommendations for closure or realignment based on "the force-structure plan, infrastructure inventory, and final selection criteria otherwise applicable[.]"[47] Finally, the 2001 amendments made other changes relating to the commission structure and disposal of property.[48]

In 2004, when preparations for the 2005 round were well underway, Congress debated proposals to delay the 2005 round for two years, until 2007.[49] Ultimately, however, Congress "put the good of the Department of Defense over parochial interests and protected the upcoming BRAC round" by rejecting the proposals.[50] Instead, Congress approved legislation ("2004 amendments") making certain modifications to the BRAC statute.[51]

B. The BRAC Statute Authorizes the Closure and Realignment of Military Installations On Which National Guard Units Are Located As Well As the Associated Relocation, Change or Retirement of National Guard Missions, Units, and Equipment.

A review of the text, history, and application of the BRAC statute confirms that its scope includes installations relating to the National Guard, and that it authorizes not only the closure and realignment of such installations but the associated relocation or change to National Guard equipment, headquarters, units, and/or missions.

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[45] Pub. L. No. 107-107, § 3001 (amending 10 U.S.C. § 2687 note to add § 2912). The 2001 amendments directed GAO to evaluate the Secretary's force-structure plan, infrastructure inventory, and need for closure or realignment. *Id.*

[46] *Id.* § 3002 (amending 10 U.S.C. § 2687 note to add § 2913).

[47] *Id.* § 3003 (amending 10 U.S.C. § 2687 note to add § 2914(b)(2)).

[48] *Id.* §§ 3003-07 (amending 10 U.S.C. § 2687 note to add §§ 2914, 2906A and amend §§ 2902, 2904-05, 2908-10).

[49] 150 CONG. REC. S5569-01, S5767-01 (daily eds. May 18-19, 2004) (debating the Lott et al. amendment to delay the 2005 round for domestic installations until 2007); 150 CONG. REC. H3406-02 (daily ed. May 20, 2004) (debating the Kennedy-Snyder amendment to delete legislative language delaying the 2005 round until 2007).

[50] 150 CONG. REC. S10945-01 (daily ed. Oct. 9, 2004) (statement of Sen. McCain) (noting that the Senate defeated the Lott amendment "aimed at crippling the upcoming BRAC round").

[51] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, div. B, tit. XXVIII, subtit. C, §§ 2831-34, 118 Stat. 1811 (codified at 10 U.S.C. § 2687 note (§§ 2912-14)).

The BRAC statute defines "military installation" as "a base, camp, post, station yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility."[52] While the BRAC statute does not define "closure," DOD defines the term in pertinent part to mean that "[a]ll missions of the installation have ceased or have been relocated; personnel positions (military civilian and contractor) have either been eliminated or relocated."[53] In a closure, all missions carried out at a military installation either cease or relocate.[54] The BRAC statute defines "realignment" as "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."[55] In a realignment, a military installation remains open but loses and sometimes gains functions.[56] Although the BRAC statute does not define "function," DOD's definition of the term includes "the appropriate or assigned duties, responsibilities, missions, or tasks of an individual, office, or organization."[57]

At the outset, the history and application of the BRAC statute confirm that the term "military installations" applies to installations on which National Guard units are located. The history of the BRAC statutory process makes clear that the executive branch and Congress regarded the BRAC process as comprehensive, covering "every" military installation.[58] Nowhere in the legislative history is there mention of any exemption for installations involving the National Guard.[59] To the contrary, the legislative history indicates that Congress specifically

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[52] 10 U.S.C. § 2687 note (§ 2910(4)).

[53] BRAC 2005 Definitions, available at http://www.defenselink.mil/brac/docs/definitions012004.pdf.

[54] U.S. General Accounting Office, Report No. GAO 02-433 ("GAO 2002 Report"), *Military Base Closures: Progress in Completing Actions from Prior Realignments and Closures*, Apr. 2002, at 5 n.6.

[55] 10 U.S.C. § 2687 note (§ 2910(5)).

[56] GAO 2002 Report, at 5 n.6.

[57] Department of Defense Dictionary of Military and Associated Terms ("DOD Dictionary"), available at http://www.dtic.mil/doctrine/jel/doddict/.

[58] Letter from the Chairman, Joint Chiefs of Staff, to the Chairman, Senate Armed Services Committee, May 18, 2004 (concluding that "BRAC has proven to be the only comprehensive, fair, and effective process for accomplishing this imperative"); H. REP. NO. 100-735, pt. II (noting that the new procedure set up by the 1988 statute would direct the Secretary to "*all* military installations in the United States") (emphasis added); H. REP. NO. 107-333 (Conf. Rep.) (expressing the conferees' view that the Secretary must "review *every* type of installation") (emphasis added); *see also* 147 CONG. REC. S9763-07 (daily ed. Sept. 25, 2001) (statement of Sen. Dorgan) (noting that the BRAC commissions "say[] to *every* military installation in the country, by the way, we are going to look at you for potential closure" and that "*every* military installation is at risk of closure") (emphasis added); *id.* S9763-07 (statement of Sen. Lott) (asserting that "*every* base, every community, every State is going to be affected by" the 2005 round) (emphasis added). *Cf.* H. REP. NO. 101-665 (stating that "[t]he committee has assiduously protected the 1988 base closure process in the face of numerous attempts to undermine it" by carving out exceptions thereto).

[59] *See, e.g.*, S. REP. NO. 101-384; S. REP. NO. 107-62; S. REP. NO. 108-260 (2004); H. REP. NO. 100-735, pts. I-IV; H. REP. NO. 101-665; H. REP. NO. 107-94 (2001); H. REP. NO. 108-491 (2004); H. REP. NO. 100-1071 (1988)

understood that "National Guard facilities will . . . be included in this process."[60] Toward that end, past BRAC rounds have recommended the closure or realignment of installations relating to the National Guard,[61] and the Secretary's infrastructure inventory submitted for the 2005 BRAC round lists thousands of National Guard installations.[62] Accordingly, installations on which National Guard units are located may be closed or realigned.[63]

Moreover, with regard to such installations, the terms of the BRAC statute authorize the associated relocation, change, or merger of National Guard missions, units, and equipment. Implicit in the statute's definition of realignment as "any action which both reduces and relocates functions and civilian personnel positions" is the common sense notion that when a military installation is *realigned* pursuant to a national plan, something other than the property or

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(Conf. Rep.); H. REP. NO. 101-923 (1990) (Conf. Rep.); H. REP. NO. 107-333 (Conf. Rep.); H. REP. NO. 108-767 (2004) (Conf. Rep.); 134 CONG. REC. S15554-04, S16882-01, H10033-01 (daily eds. Oct. 12, 19, 26, 1988); 136 CONG. REC. E3511-02, H7297-05 (daily eds. Sept. 11, Oct. 26, 1990); 147 CONG. REC. S9565-01, S9763-07, S10027-07, S13118-01, H10069-01 (daily eds. Sept. 21, 25, Oct. 2, Dec. 13, 2001); 150 CONG. REC. S5515-01, S5569-01, S5767-01, S7277-01, S10945-01, H3260-02, H3406-02, H3445-01, (daily eds. May 17-19, 20, June 17, Oct. 9, 2004).

[60] 147 CONG. REC. S5569-01 (daily ed. May 18, 2004) (statement of Sen. Lott) (warning that senators should "[k]eep this in mind[; t]he next BRAC round will include National Guard"); *see also* 147 CONG. REC. S9763-07 (daily ed. Sept. 25, 2001) (statement of Sen. Lott) (arguing that the U.S. should not say to the National Guard and others being called up that "[b]y the way, we are going to look at closing your base"); 150 CONG. REC. H3406-02 (daily ed. May 20, 2004) (statement of Rep. Ortiz) (arguing that "[w]e have now begun to rely so much on the National Guard and Reserve . . . [that it is] time to step back and look at what is happening" and delay the 2005 round); 150 CONG. REC. H3406-02 (daily ed. May 20, 2004) (statement of Rep. Kolbe) (noting that he supported a 2005 BRAC round even though "the 162nd Fighter Wing of the Arizona Air National Guard which is the largest air guard unit in the United States" was in his district).

[61] *See, e.g.*, 1988 Secretary's Commission Report (recommending closure of Pease Air Force Base in New Hampshire and directing that the 132nd Air Refueling Squadron (ANG) be relocated should local authorities decide against operating the facility as an airport); Defense Base Closure and Realignment Commission: Report to the President, 1991 ("1991 BRAC Commission Report") (recommending closure of Rickenbacker Air Guard Base ("Rickenbacker") in Ohio and transfer of the 160th Air Refueling Group (ANG) to Wright-Patterson AFB in Ohio); Defense Base Closure and Realignment Commission: Report to the President, 1993 ("1993 BRAC Commission Report") (recommending that the 1991 recommendation regarding Rickenbacker be modified to move the 160th Air Refueling Group (ANG) and the 121st Air Refueling Wing (ANG) to a cantonment area at Rickenbacker); 1995 BRAC Commission Report (recommending closure of Ontario International Airport Air Guard Station in California, Roslyn Air Guard Station in New York, and Chicago O'Hare IAP Air Reserve Station in Illinois with relocation of the 126th Air Refueling Wing (ANG) to Scott AFR in Illinois and relocations of other ANG units to locations acceptable to the secretary of the Air Force).

[62] Section 2912 Report, at 25-35.

[63] A series of related provisions enacted as part of the same legislation as the 1990 statute reinforce the notion that Congress intended to utilize the National Guard as part of a complete and efficient military force. Pub. L. No. 101-510, § 1431(a). Specifically, Congress indicated that DOD "should shift a greater share of force structure and budgetary resources to the reserve components of the Armed Forces." *Id.* § 1431(a)(4). Congress also found that "[t]he reserve components of the Armed Forces are an essential element of the national security establishment of the United States" and that national and world events "require the United States to increase use of the reserve components of the Armed Forces." *Id.* § 1431(a)(1)-(2).

installation itself is at issue. Units and headquarters have duties, responsibilities, missions and tasks, and it is those that will cease, be reorganized or be relocated to support the force-structure plan, in accordance with the final selection criteria. Supporting this understanding is the sole judicial interpretation of "realignment," which specifies that the Secretary may take "any action which . . . involves the positioning of one group of functions *or* personnel relative to another group."[64]

The BRAC statutory scheme itself supports this view, as it provides that the Secretary may "take such actions as may be necessary to close or realign any military installation, including the acquisition of such land, the construction of such replacement facilities, the performance of such activities, and the conduct of such advance planning and design *as may be required to transfer functions from a military installation being closed or realigned to another military installation.*"[65] Consequently, with respect to both the realignment and closure of bases, the statute contemplates that functions – "assigned duties, responsibilities, missions, or tasks of an individual, office, or organization" – may be relocated from one military installation to another.[66] Hence, the BRAC statute authorizes the Secretary to recommend and take any action necessary to terminate operations or reduce and relocate National Guard equipment, headquarters, units, and/or missions at any "base, camp, post, station yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility."[67] Because the BRAC statute applies in the first instance to military installations on which National Guard units are located, it necessarily also applies to National Guard units, missions, and equipment associated with those installations

Finally, the BRAC statute covers both real and personal property.[68] The statute authorizes the Secretary to transfer real property from a closed or realigned installation to another military department.[69] The statute also empowers the Secretary to move any personal property located at such an installation if the property: "(i) is required for the operation of a unit,

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[64] *County of Seneca v. Cheney*, 12 F.3d 8, 11 (2d Cir. 1993) (contrasting realignment, or the transfer or regrouping of functions and personnel, with the mere elimination of a particular function or RIF at an Army depot in New York) (emphasis added).

[65] 10 U.S.C. § 2687 note (§ 2905(a)) (emphasis added).

[66] DOD Dictionary, available at http://www.dtic.mil/doctrine/jel/doddict/.

[67] 10 U.S.C. § 2687 note (§ 2910(4)).

[68] *Id.* (§ 2905(b)) (granting the Secretary authority over "real property, facilities, and personal property located at a closed or realigned military installation"). "Real property" consists of "lands, buildings, structures, utilities systems, improvements, and appurtenances thereto. Includes equipment attached to and made part of buildings and structures (such as heating systems) but not movable equipment (such as plant equipment)." DOD Dictionary, available at http://www.dtic.mil/doctrine/jel/doddict/. "Personal property" includes "[p]roperty of any kind or any interest therein, except real property, records of the Federal Government, and naval vessels of the following categories: surface combatants, support ships, and submarines." *Id.*

[69] 10 U.S.C. § 2687 note (§ 2905(b)(2)(C)).

function, component, weapon, or weapons system at another location; (ii) is uniquely military in character, and is likely to have no civilian use[;] (iii) is not required for the reutilization or redevelopment of the installation (as jointly determined by the Secretary and the redevelopment authority); (iv) is stored at the installation for purposes of distribution (including spare parts or stock items); or (v) meets known requirements of another Federal department."[70] Accordingly, there is no statutory basis for limiting the Secretary's authority solely to transfers of real estate: equipment may be relocated without apparent limitation, and the relocation of headquarters, units, or missions between one military installation and another in conjunction with a closure or realignment is permitted. However, the BRAC statute itself appears to provide no authority for the retirement of equipment, as opposed to transfer or relocation of equipment, whether such retirement is otherwise permissible. Again, common sense supports the statutory language: given the coordinated, comprehensive, and non-partisan review of military installations that the BRAC process represents, it seems highly dubious that the closure and realignment of military installations was intended to take place without concomitant changes to, and relocation of, equipment, headquarters, units, and/or missions.[71]

IV. The BRAC Statute Is the Exclusive Authority for Closure and Realignment of Military Installations.

Notwithstanding the breadth of the BRAC statute, it has been argued that two statutes would prohibit the closure or realignment of military installations to the extent that the closure or realignment implicates relocation or retirement of National Guard equipment, units, or missions: 10 U.S.C. § 18238 and 32 U.S.C. § 104(c). In determining whether those statutes qualify the authority under the BRAC statute, the most sustainable conclusion is that neither statute limits the ability of the Secretary or the BRAC Commission to recommend the closure or realignment of military installations, even where the closure or realignment implicates associated relocation or changes to National Guard equipment, headquarters, units, and/or missions.

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[70] *Id.* (§ 2905)b)(3)(E)). Even where such disposition involves personal property – such as planes or equipment – issued by the United States to the National Guard unit of a particular State pursuant to a Congressional earmark requiring that property to be located in that state, the BRAC statute's grant of authority contains no restrictions on disposition of planes or other equipment. *See generally id.* (§§ 2901-2914). In any event, "[a]ll military property issued by the United States to the National Guard remains the property of the United States." 32 U.S.C. § 710(a).

[71] A 1995 General Accounting Office report confirms this reading of the BRAC process, noting that:

> [t]he term base closure often conjures up the image of a larger facility being closed than may actually be the case. Military installations are rather diversified and can include a base, camp, post, station, yard, center, home-port, or leased facility. Further, more than one mission or function may be housed on a given installation[. Thus] an individual [BRAC] recommendation may actually affect a variety of activities and functions without fully closing an installation. Full closures, to the extent they occur, may involve relatively small facilities, rather than the stereotypically large military base.

U.S. General Accounting Office, Report No. GAO/NSIAD-95-133 ("GAO 1995 Report"), *Military Bases: Analysis of DOD's 1995 Process and Recommendations for Closure and Realignment*, Apr. 1995, at 19-20.

A. 10 U.S.C. § 18238.

Originally enacted as part of the National Defense Facilities Act of 1950 ("NDFA"), § 18238 of title 10, U.S. Code, provides that:

> [a] unit of the Army National Guard of the United States or the Air National Guard of the United States *may not be relocated or withdrawn under this chapter* without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia.[72]

Enactment of the NDFA was spurred by Congressional concern about the lack of facilities in the post-World War II era for the greatly expanded National Guard.[73] Congress therefore authorized the Secretary to acquire and equip facilities as necessary to support reserve components, including the National Guard.[74] Because reserve units had encountered difficulties sustaining their units in communities with insufficient manpower, Congress directed the Secretary to determine whether the number of units located in an area exceeded the area's manpower.[75] Toward that end, Congress granted the Secretary "final authority" to disband or remove a unit from an area, but directed him to consult with the governor about a National Guard unit before making a final decision.[76] In 1958, during a routine recodification of title 10, the consultation requirement transformed into the "consent" requirement now found in the current version of the statute.[77]

Although the objectives of the NDFA and BRAC are disparate, § 18238 appears to require gubernatorial consent before a unit of the National Guard may be relocated or withdrawn. Notably, however, § 18238 governs only those relocations or withdrawals "under this chapter," a phrase that consistently has been interpreted as relating to the provisions of the chapter in which the limitation or definition exists.[78] The chapter under which § 18238 falls – chapter 1803 –

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[72] 10 U.S.C. § 18238 (emphasis added).

[73] H.R. REP. NO. 81-2174 (1950); S. REP. NO. 81-1785 (1950).

[74] National Defense Facilities Act, Pub. L. No. 81-783, §§ 2-8 (1950); S. REP. NO. 81-1785. Since its enactment, § 18238 has been amended on four occasions to remove surplusage and redesignate sections. Act of Aug. 10, 1956 (70A Stat. 123); Pub. L. No. 85-861 (1958); Pub. L. No. 97-214 (1982); Pub. L. No. 103-377 (1994).

[75] Pub. L. No. 81-783, § 4(a)(1); S. REP. NO. 81-1785.

[76] S. REP. NO. 81-1785; Pub. L. No. 81-783, § 4(b). As enacted, § 18238 required simply that "the governor . . . shall have been consulted with regard to such withdrawal or change of location." *Id.*; *see* S. Hrg. on S. 960 (1949) (discussing whether the consultation requirement should be converted to a consent requirement or deleted altogether).

[77] Pub. L. No. 85-861, §; S. REP. NO. 85-2095 (1958). Neither the legislation nor its legislative history provide an explanation for this transformation. *Id.*

[78] *Portland Golf Club v. C.I.R.*, 497 U.S. 154, 164-65 (1990) (holding that the phrase "allowed by this chapter" cannot be rendered superfluous); *Green v. Brantley*, 981 F.2d 514, 518-19 (11th Cir. 1993) (holding that a Federal Aviation Administration repeal of a pilot certificate constituted action "under this chapter" within the meaning of a

addresses "Facilities for Reserve Components," and neither cross-references nor mentions BRAC, which is contained in chapter 159. Consequently, we conclude that the relocation or withdrawal of National Guard units associated with a closure or realignment pursuant to the BRAC statute does not require gubernatorial consent under § 18238.[79]

B. 32 U.S.C. § 104(c).

Section 104 of title 32, U.S. Code, sets forth the location, organization, and command of National Guard units. Subsection (c) states that

> [t]o secure a force the units of which when combined will form complete higher tactical units, the President may designate the units of the National Guard, by branch of the Army or organization of the Air Force, to be maintained in each State and Territory, Puerto Rico, and the District of Columbia. However, *no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor.*[80]

As originally incorporated in the National Defense Act of 1916 ("NDA"), § 104(c) focused solely on the President's power to designate National Guard units, and did not include the prohibition barring changes in the branch, organization, or allotment of certain units absent gubernatorial approval.[81]

In 1933, Congress amended the NDA to authorize the President to order the National Guard into federal service upon a Congressional declaration of emergency, rather than via draft.[82] Congress also undertook certain unrelated modifications to the NDA, among them the addition of a proviso to § 104 requiring a governor's approval prior to a "change in the allotment, branch, or arm" of certain National Guard units.[83] In explaining the reasoning for this addition,

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(Continued . . .)
statute providing exclusive jurisdiction over review of orders issued under Chapter 20 of Federal Aviation Act); *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2718 (2005) (Scalia, J. dissenting) (acknowledging that the Federal Communications Commission could not use its Title I powers to impose common-carrier-like requirements, since the statute provided that a "'telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services' (emphasis added), and 'this chapter' includes Titles I and II." (emphasis in original)).

[79] Although we conclude that neither § 18238 nor § 104(c) *requires* gubernatorial consent before a National Guard unit or base may be realigned or closed, nothing prevents the Secretary or his representative from consulting with state governors and reaching mutually-satisfactory agreements, so long as the Secretary's *recommendations* are based on the statutory criteria. The discretion to decide whether to consult with the governors, however, *lies with the Secretary*.

[80] 32 U.S.C. 104(c) (emphasis added).

[81] H.R. REP. NO. 73-141 (1933).

[82] *Id*; S. REP. NO. 73-135 (1933); Pub. L. No. 73-64, § 18 (1933).

[83] Pub. L. No. 73-64, § 6; H.R. REP. NO. 73-141. In 1956, during the revision of title 32 and without explanation, the proviso was rewritten as a separate sentence. Pub. L. No. 84-1028 (1956); S. REP. NO. 84-2484 (1956).

the House Committee on Military Affairs stated that "that where a State has gone to considerable expense and trouble in organizing and housing a unit of a branch of the service, [the] State should not *arbitrarily* be compelled to accept a change in such allotment[.]"[84]

Although the statute does not define "branch, organization or allotment," these terms likely refer to the mission, structure, or location of a National Guard unit.[85] On its face, § 104(c) requires gubernatorial consent before a "change in the branch, organization, or allotment of a [National Guard] unit located entirely within a State may be made."[86] At the same time, a wide range of recommended changes to the mission, structure, or location of a National Guard unit on a military installation falls under BRAC authority, as the BRAC statute authorizes relocation or change to National Guard equipment, headquarters, units, and/or missions corollary to the closure or realignment of military installations.[87] Some of those proposed changes also alter the branch, organization, or allotment of a National Guard unit as provided in 32 U.S.C. § 104(c).

Consequently, one may argue that a conflict appears to exist between § 104(c), which requires gubernatorial approval prior to a change in the "branch, organization, or allotment of a [National Guard] unit located entirely within a State,"[88] and the BRAC statute, which neither contains nor contemplates gubernatorial approval.[89] An analysis of the text, purpose, and legislative history of the BRAC statute indicates that the National Guard is not exempt from its exclusive and plenary authority. Therefore, to the extent that there is a conflict, BRAC controls.[90]

C. 10 U.S.C. § 2687.

Section 2909(a) of the BRAC statute, entitled "Restriction on Other Base Closure Authority," flatly states that "during the period beginning on November 5, 1990, and ending on April 15, 2006, *this part shall be the exclusive authority* for selecting for closure or realignment, or for carrying out *any* closure or realignment of, a military installation inside the United States."[91] Section 2905(a)(1)(A) provides broad authority to the Secretary: "In closing or

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[84] H.R. REP. NO. 73-141 (emphasis added).

[85] Notably, none of these terms lends itself to a definition that includes "equipment," "personal property," or planes; § 104 does not appear to require gubernatorial approval for changes to same, whether under the BRAC statute or otherwise.

[86] 32 U.S.C. § 104(c).

[87] *See* part III, *supra*.

[88] 32 U.S.C. § 104(c).

[89] 10 U.S.C. § 2687 note (§§ 2901-2914). The BRAC statute contains no state or local approval requirements whatsoever. *See generally id.*

[90] *See* part III, *supra*.

[91] *Id.* (§ 2909(a)) (emphasis added).

realigning *any* military installation under this part, the Secretary may take such actions as may be necessary to close or realign[.]" Nothing in the BRAC statute or the 2001 and 2004 amendments pertaining to the 2005 Round appears to limit application of the BRAC process to closures or realignments of a certain size and impact. Indeed, the statute explicitly provides that the Secretary may close or realign military installations "without regard to section[] 2687."[92] Therefore, the threshold requirements contained in § 2687(a) cannot be used to impede closures and realignments made under BRAC authority.[93]

Congress made clear in the BRAC statute that the BRAC process is not required for actions taken for reasons of national security and military emergency.[94] Because of the BRAC statute's waiver of "sections" of § 2687,[95] the Secretary no longer has to certify such justifications to Congress and BRAC is not a restriction on that other base closure authority.[96] The waiver provision, which states that the Secretary "may close or realign military installations under this part without regard to . . . sections" of § 2687,[97] seems designed to ensure that neither the laborious notification and layover procedures under § 2687(b) and (d), nor the size thresholds outlined in § 2687(a), preclude the Secretary from utilizing the BRAC process to close or realign installations. What is less clear is whether the exceptions to BRAC's exclusivity under § 2909 for "closures and realignments to which section 2687 of title 10, United States Code [this section], is not applicable" means that the BRAC process is only *mandatory* for those closures that affect an installation where at least 300 civilian personnel are authorized to be employed or realignments that involve reductions by more than 1,000, or 50%, of authorized civilian personnel.[98]

Reading the BRAC statute's waiver provision in conjunction with the "exclusivity" provision,[99] one possible rendering is that the BRAC process is the sole mechanism for closing and realigning military installations regardless of the size of the impact, and that the exception in § 2909(c)(2) is designed solely to ensure that the waiver provision does not unintentionally

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[92] *Id.* (§ 2905(d)).

[93] To the extent that § 2687 applies, however, § 2687(a) contains strong language indicating that closures may only proceed according to BRAC and its related statutes: "Notwithstanding any other provision of law . . . ." Hence, any action which: (a) closes an installation at which at least 300 civilian personnel are authorized to be employed, or (b) realigns an installation that meets the § 2687(a) threshold via the transfer of functions and personnel, including those of the National Guard, proceeds irrespective of other provisions of law, such as 32 U.S.C. § 104(c).

[94] 10 U.S.C. § 2687 note (§ 2909(c)(2)).

[95] *Id.* (§ 2905(d)).

[96] *See* 10 U.S.C. § 2687(c).

[97] *Id.* § 2687 note (§ 2905(d)(2)).

[98] *Id.* § 2687(a).

[99] *Id.* § 2687 note (§ 2909).

preclude the President from carrying out closures and realignments for national security and military emergency reasons outside the BRAC process. This reading makes the most sense, given the broad definition of military installation, the absence of any referent to numeric thresholds under "this part," and the comprehensive nature of the BRAC statute and process.[100]

Another possible reading, however, is that the waiver provision merely ensures that the Secretary is not precluded from making closures and realignments by any subsection of § 2687 and that the exception to exclusivity in § 2909(c)(2) for closures and realignments "to which section 2687 . . . is not applicable" leaves discretion not only for national security purposes, but for recommending closures and realignments that would not have required compliance with the prior statutory scheme under § 2687(a).

The view that the BRAC statute is less exclusive for actions that affect less than the numerical thresholds of civilian personnel contained in § 2687(a) appears to be erroneous for two reasons. First, the BRAC statute supplants § 2687. Second, such a view reads the exception to exclusivity clause in § 2909(c)(2) so as to utilize § 2687(a) as a *restriction* of the Secretary's authority to close or realign installations under BRAC, along with related relocations of, and changes to equipment, headquarters, units and/or missions, instead of a *preservation* of the Secretary's authority for recommending closures and realignments that would not have required compliance with the prior statutory scheme, such as national security movements.[101] The BRAC statute specifically waived any encumbrances from "sections 2662 and 2687 of title 10" in the Secretary's execution of closures and realignments.[102]

Resolution of the above conflict does not impact the analysis with respect to § 18238. Nor does it extend the limitations contained in § 104(c) to recommendations for closure or realignment that transfer military property. However, if it were determined that BRAC is not the exclusive mechanism for closure or realignment of military installations below the numeric thresholds contained in § 2687(a), in those instances where other mechanisms for closure or realignment exist, there is no apparent authority for utilizing a discretionary statute to evade other legal limitations.[103]

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[100] *See* part III, *supra.*

[101] *See* Part III.B, *supra.*

[102] 10 U.S.C. § 2687 note (§ 2905(d)(2)).

[103] This would not hold true if the BRAC statute implicitly repealed these other provisions. While federal courts make an effort to harmonize potentially conflicting statutes, the Supreme Court has recognized repeals by implication "if there is an irreconcilable conflict between the two provisions or if the later Act was clearly intended to 'cove[r] the whole subject of the earlier one.'" *Branch v. Smith*, 538 U.S. 254, 256-57 (2003) (Stevens, J., concurring) (internal citation omitted). The comprehensive nature of the BRAC statutory scheme, combined with the legislative history indicating express intent to limit the influence of local politics and include National Guard functions, equipment, and units in the 2005 round, lend strong support to the notion that Congress intended to occupy the field of closures and realignments with this legislation.

D. BRAC's Statutory Scheme Envisions Limited Involvement by State or Local Government In Recommendations to Close or Realign Military Installations.

There are additional reasons for interpreting the BRAC process as the exclusive mechanism for closure or realignment of bases, with no requirement for gubernatorial consent even with respect to recommendations for military installations below the numeric threshold contained in § 2687(a).

Congress created the BRAC process to reduce parochial political obstacles to realignment and closure. Prior to enactment of the BRAC statute, the Secretary noted that "the Department of Defense is unable to close or realign unneeded military installations because of impediments, restrictions, and delays imposed by provisions of law."[104] Senator Warner similarly related that the Secretary "requested that Congress enact legislation to remove the various impediments in law that prevent timely closure of military bases."[105] Senator Boschwitz also characterized an earlier version of the BRAC statute as an effort to "remove[] Congress from micromanaging each and every proposal to close a military base."[106] Subsequent to the BRAC statute's passage, Congress has rejected attempts to overturn the BRAC Commission's recommendations for closure and realignment and has rejected allowing "parochial concerns [to] override the needs of the military."[107] Thus, in passing the BRAC statute, Congress sought to eliminate the interference of localized interests in the efficient operation and realignment of the national military structure.

Accordingly, the BRAC statute requires gubernatorial *consultation* only for the limited purposes of disposing of "surplus real property or facilit[ies]," and considering the availability of public access roads, *subsequent* to any BRAC closure or realignment.[108] BRAC itself thus eliminates the need to consult governors in matters realigning National Guard installations and affected personnel, equipment, and functions, except for these residual matters.

E. The BRAC Statute Is the More Recent and Comprehensive Statute.

Moreover, to say an existing legal restriction like § 104(c) controls whenever it conflicts with a legitimate exercise of BRAC authority reverses the well-settled principle of statutory

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[104] H. REP. NO. 100-735, pt. I.

[105] 134 CONG. REC. S16882-01 (daily ed. Oct. 19, 1988) (statement of Ranking Member Warner).

[106] 134 CONG. REC. S15554-04 (daily ed. Oct. 12, 1988) (statement of Sen. Boschwitz).

[107] 147 CONG. REC. S10027-07 (daily ed. Oct. 2, 2001) (statement of Sen. McCain).

[108] 10 U.S.C. § 2687 (§ 2905(b)(2)(D)-(E)). The Secretary must also inventory and identify any leftover "personal property" six months *after* any Presidential approval of a closure and realignment, and then consult with the local redevelopment authority, local government, or designated state agency to discuss the use of such property in the redevelopment plan of the vacated or condensed installation. *Id.* § 2905(b). *See supra* note 68.

construction: "To the extent there is a conflict, the *most recently passed* statute or rule prevails."[109]

Congress originally passed § 104(c) in 1916. Its last action on the statute was a technical amendment in 1988.[110] Meanwhile, Congress enacted the BRAC statute in 1990 and authorized the current BRAC round in 2001 and 2004. These latest authorizations included significant amendments to the BRAC statute, including § 2914 ("Special Procedures for Making Recommendations for Realignments and Closures for 2005 Round"), which requires the Secretary to "consider any notice received from a local government . . . [that] would approve of the closure or realignment of the installation," but permits the Secretary to make the recommendations "[n]otwithstanding" this input "based on the force-structure plan, infrastructure inventory, and final selection criteria otherwise applicable to such recommendations."[111] These more recent, specific provisions in the BRAC statute trump those of earlier, more general statutes.[112]

Congress is presumed to have knowledge of prior statutes[113] and precedents[114] when it enacts legislation, and with this understanding in mind, it made the BRAC statute "the exclusive authority" for closing and realigning military facilities and functions. Earlier statutes that address the same topic have no force.

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[109] *Farmer v. McDaniel*, 98 F.3d 1548, 1556 (9th Cir. 1996) (quoting *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991)) (emphasis added); *Internat'kl Union, United Auto., Aerospace & Agric. Implement Workers, Local 737 v. Auto Glass Employees Fed. Credit Union*, 72 F.3d 1243, 1248-1249 (6th Cir. 1996). The Supreme Court has similarly commented in the context of conflicting statutes and treaties that "'when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" *Breard v. Greene*, 523 U.S. 371, 376 (1998) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957)).

[110] This analysis pertains equally to § 18238.

[111] 10 U.S.C. 2687 note (§ 2914). The Secretary is also required to explain its decision to accept or reject the local government input in its recommendation. *Id.* (§ 2914(b)(2)(C)).

[112] *United States v. Estate of Romani*, 523 U.S. 517, 530-33 (1998) (holding that a later, specific statute trumps an earlier, more general statute).

[113] *E.g.*, *Reno v. Koray*, 515 U.S. 50, 56 (1995) ("'It is not uncommon to refer to other, related legislative enactments when interpreting specialized statutory terms,' since Congress is presumed to have 'legislated with reference to' those terms.") (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407-408 (1991))).

[114] *E.g.*, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979) ("In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.").

V. Challenges to the 2005 BRAC Closures and Realignments.

A. The BRAC Commission May Only Make Changes to Recommendations That Substantially Deviate From the Force-Structure Plan and Final Criteria.

The Secretary's discretion in making recommendations is delimited by statute to compliance with the selection criteria, force-structure plan, and infrastructure inventory for the Armed Forces and military installations worldwide. Similarly, the BRAC Commission plays an integral but defined role in reviewing the Secretary's recommendations. In making its own recommendations to the President, the BRAC Commission is only granted statutory authority to make changes to the Secretary's recommendations "if the Commission determines that the Secretary deviated substantially from the force-structure plan" based on the Secretary's assessments of national security and anticipated funding, and "final criteria" outlined in § 2913.[115]

For example, in making its recommendations, the BRAC Commission *may not* take into account for any purpose any advance conversion planning undertaken by an affected community with respect to the anticipated closure or realignment of a military installation.[116] The final selection criteria specified in § 2913 "shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory . . . in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005."[117] Hence, even if the BRAC Commission believed that other law conflicts with the Secretary's recommendations under exclusive BRAC authority, the statute does not appear to either require or permit the BRAC Commission to delist recommendations on this basis.

B. There Is No Judicial Review Available for Challenges to BRAC.

Even if § 18238 or § 104(c) required gubernatorial consent or approval for BRAC's realignment of military installations that impact National Guard functions, there appears to be no cause of action or judicial review available for the failure to obtain such consent or approval.

1. The Statutes Do Not Provide a Right of Action.

As the Supreme Court has established, "private rights of action to enforce federal law must be created by Congress."[118] However, nothing in the text of the BRAC statute, § 18238, or

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[115] 10 U.S.C. § 2687 note (§§ 2903(d)(2)(B), 2913).

[116] *Id.* (§ 2903(d)(2)(E)).

[117] *Id.* (§ 2913(f)). Although Congress added the infrastructure inventory to §§ 2912 and 2913(f) in later amendments, it did not add it to the Commission's directives in § 2903(d)(2)(B). *Id.* (§§ 2903(d)(2)(B), 2912(a)(1), 2913(f)).

[118] *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

§ 104(c) explicitly provides for a right of action.[119] Without a potential cause of action, a party cannot file even a declaratory judgment suit. As the Declaratory Judgment Act is "procedural only,"[120] a party must refer to an actual cause of action to gain jurisdiction under the statute.[121]

Moreover, it is unlikely that a court would find an implied right of action in the BRAC statute, § 18238, or § 104(c). In analyzing whether a statute creates a private right of action, the Supreme Court recently confirmed that, where an explicit cause of action is absent, a party bears a heavy burden to establish that Congress nonetheless intended to authorize remedies for private litigants.[122] Neither § 18238 nor § 104(c) provides any indication that Congress intended to create a private right of action. Like the statutes in *Sandoval* and *Gonzaga University*, both statutes are devoid of the "rights-creating language" apparent in statutes such as Title VI and Title IX.[123] The language of § 18238 states that "no change . . . may be made without the approval of its governor" while the language of § 104(c) states that "[a] unit . . . may not be relocated or withdrawn . . . without the consent of the governor of the State[.]" This language is entirely different from that which the Supreme Court has stated was sufficient to create a private right of action, even under the pre-*Sandoval* standard.[124] Additionally, no party has asserted that the BRAC statute confers any rights on any individuals. And even if a statute is phrased in explicit rights-creating terms, "a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'"[125] Therefore, is it unlikely that a court would impute Congressional intent to create a private right of action under the statutes at issue.[126]

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[119] *Haw. Motor Sports Ctr. v. Babbitt*, 125 F. Supp. 2d 1041, 1046 (D. Haw. 2000) (holding that the BRAC statute did not expressly or impliedly create a private right of action).

[120] *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950).

[121] Thus, although the Declaratory Judgment Act expands the courts' remedial powers, it is not an independent basis of jurisdiction. *Id.*; *Hawaii Motor Sports Ctr*, 125 F. Supp. 2d at 1045-46.

[122] *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2002) ("Just last Term it was noted that we abandoned the view of *Borak* decades ago, and have repeatedly declined to revert to the understanding of private causes of action that held sway 40 years ago.") (internal quotation marks omitted) (citing *Sandoval*, 532 U.S. at 287). For illustrations of the expansive approach to implied private rights of action that has since been abandoned see *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Cort v. Ash*, 422 U.S. 66 (1975); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

[123] 42 U.S.C. § 2000d; 20 U.S.C. § 1681(a). *See Sandoval*, 532 U.S. at 288 (internal quotations omitted); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 n.3 (2002).

[124] *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 (1969) (holding that § 5 of the Voting Rights Act, which provided that "no person shall be denied the right to vote for failure to comply with this section," entitled appellants to seek a declaratory judgment that a new state enactment was covered by the Act in light of the explicit rights language and the clear purpose of the Act).

[125] *Gonzaga Univ.*, 536 U.S. at 284 (citing *Sandoval*, 532 U.S. at 286) (emphasis in original).

[126] *Id.* at 284 n.3.

Even if analyzed under the pre-*Sandoval* factor test, the statutes at issue focus upon actions taken by the United States and do not "protect" any individual's interests. The statutes limit the ability of the United States to relocate or withdraw units absent gubernatorial consent. The language of the text of the statutes does not indicate that Congress passed them to protect governors. These statutes focus on the entity regulated – the United States. Thus, there is "no implication of an intent to confer rights on a particular class of persons."[127]

In any event, it is irrelevant whether Congress intended governors to benefit from the statutes. The essential inquiry is whether Congress unambiguously conferred a right and not whether vague "benefits" or "interests" are enforceable.[128] Just as the Court in *Gonzaga University* summarily dismissed the plaintiff's argument that Congress intended him to benefit from the statute, such an argument would likely be dismissed here because there is no explicit "rights-creating" language in the statutes at issue.

2. The Supreme Court Has Held That Parties May Not Bring Suit to Challenge BRAC Pursuant to the APA.

The Supreme Court's holding in *Dalton v. Specter*[129] precludes any challenge to BRAC under the Administrative Procedure Act (APA).[130] In *Dalton*, the Court held that the actions of the Secretary and BRAC Commission could not be reviewed under the APA because they are not "final agency actions."[131] Actions taken by the Secretary and BRAC Commission have "no direct consequences" for base closings until the President makes the final decision. Until that time, BRAC's recommendations are tentative and the equivalent of the ruling by a subordinate official.[132]

Moreover, the President's final decision is not subject to review under the APA because the President is not an "agency."[133] Any claim that the President exceeded the terms of the BRAC statute or failed to honor § 104(c) or § 18238 is not a constitutional claim, but a statutory one.[134] Indeed, the Supreme Court in *Dalton* noted that it has "distinguished between claims of

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[127] *Sandoval*, 532 U.S. at 289.

[128] *Gonzaga Univ.*, 536 U.S. at 283.

[129] 511 U.S. 462 (1994).

[130] 5 U.S.C. 701 *et seq.*

[131] *Dalton*, 511 U.S. at 469 .

[132] *Id.* at 469-70.

[133] *Id.* at 470 (citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992)).

[134] *Id.* at 474.

constitutional violations and claims that an official has acted in excess of his statutory authority," suggesting that *Bivens* actions would be foreclosed as well.[135] As such, the President's decision is not subject to review where the statute "commits the decision to the discretion of the President."[136] Stated plainly, "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review."[137] Because the BRAC statute "does not at all limit the President's discretion" in deciding to adopt BRAC's recommendations, the Court cannot review "[h]ow the President chooses to exercise the discretion Congress has granted him[.]"[138]

Only one court has found, in the face of *Dalton*, judicial power to review executive action. In *Role Models America, Inc. v. White*,[139] a panel of the D.C. Circuit found judicial review available for the failure to adhere to notice requirements once the Defense Department published a rule of decision and obligated itself to convey closed military base property to a state-created development corporation. The panel attempted to distinguish itself from the Supreme Court by characterizing *Dalton* as applying only to matters "that have found a lack of final agency action."[140] The *Dalton* Court, however, made clear in a discussion of an analogous circumstance that it could not review even a President's *final* decision with respect to the recommendations: "the President's decision to approve or disapprove the orders [is] not reviewable, because 'the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate.'"[141] Thus, *Dalton* controls any APA challenge to the BRAC process. Any attempt to bring suit in this context under the APA should fail.

VI. Conclusion.

The Secretary may recommend the closure and realignment of installations on which National Guard units are located, as well as the relocation of or changes to equipment,

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[135] *Id.* at 472 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396-97 (1971) (distinguishing between "actions contrary to [a] constitutional prohibition" and those "merely said to be in excess of the authority delegated . . . by the Congress"); *Wheeldin v. Wheeler*, 373 U.S. 647, 650-52 (1963) (distinguishing between "rights which may arise under the Fourth Amendment" and "a cause of action for abuse of the [statutory] subpoena power by a federal officer").

[136] *Id.* at 474.

[137] *Id.* at 473.

[138] *Id.* at 476; *accord Cohen v. Rice*, 992 F.2d 376, 381 (1st Cir. 1993) (holding that BRAC commission recommendation for closure of Air Force base was not "final agency action").

[139] *Role Models Am., Inc. v. White*, 317 F.3d 327, 331 (D.C. Cir 2003).

[140] *Id.* at 332.

[141] *Dalton*, 511 U.S. at 475 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 114 (1948)).

headquarters, units, and/or missions associated with those closures and realignments, without seeking or obtaining the consent of the governors of the states in which the changes would take place. The closures and realignments discussed in this memorandum fall within BRAC's text and purpose to establish an efficient and apolitical method of determining how best to allocate the nation's military resources. To the extent any recommendation might implicate § 18238 or § 104(c), the more recent and comprehensive BRAC statute appears to control. Finally, as neither the BRAC statute nor § 18238 or § 104(c) provide for a cause of action, and as the Supreme Court has already rejected BRAC challenges brought pursuant to the APA, a declaratory judgment action or an APA suit to challenge either the BRAC's recommendations or the President's decision regarding those recommendations should fail.